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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-21

T. R. GRUBBS, d b a T. R. GRUBBS
TIRE & APPLIANCE,
Petitioner,

vs.

GENERAL ELECTRIC CREDIT CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

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GENERAL ELECTRIC CREDIT CORPORATION,
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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on April 13, 1973.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It is set forth in the appendix, as are the order denying rehearing and the order staying mandate.

JURISDICTION

The judgment of the Court of Appeals was rendered on April 13, 1973. Petition for rehearing was denied on May 14, 1973 and motion to stay mandate was granted on May 29, 1973. The jurisdiction of this court is invoked under 28 USC 1254 (1).

QUESTIONS RAISED

1. May a nationwide credit corporation (General Electric Credit Corporation) send its employees into the homes of customers of a small business man, to pick up merchandise he sold, and destroy the small business man's reputation and livelihood by malicious falsehoods and other acts, and then escape liability therefor on grounds of failure to prove agency, because the small business man's customers did not know the names of the employees and could not swear that they worked for G.E.C.C., even though (1) the men told the customers that they worked for G.E.C.C.; (2) official representatives of G.E.C.C. at the trial did not deny it; (3) G.E.C.C. took immediate possession of and sold the very merchandise which the men picked up, charging the small business man with a deficiency thereon; (4) it was proved that the men who picked up the merchandise were the same men who made the malicious statements; (5) G.E.C.C. officers admitted that their agents were in that area picking up merchandise from the small business man's customers at about the time the malicious statements were made; and (6) the trial court found that such men were employees of G.E.C.C., acting in the scope of their employment?

2. May a credit corporation force one of its dealers to buy back certain customer accounts it financed for him, taking a promissory note from the dealer for the amount

(purchase price) of said accounts, and then pick up the merchandise securing those accounts, collect the accounts itself, and in resulting litigation, still recover judgment for the full amount of the note, even though the agreement between them provided that when the dealer was required to purchase accounts he would then own such accounts and have the right to foreclose on the merchandise securing the accounts?

3. May General Electric Credit Corporation be allowed recovery in full on a $66,000.00 note, even though the trial court found that the note was induced by the false and fraudulent representations of G.E.C.C. and there had been a complete failure of consideration, simply because the notes represented an open account which the payor allegedly previously owed G.E.C.C.? (Conflict of decision with *Schmidt and Story* v. *Bank of Commerce,* 58 L. Ed. 1214).

4. Is it a double recovery for the credit company to sell accounts and collateral, taking a note for the sales price, and then take back the accounts and collateral, yet still recover judgment for the full amount of the note?

PREVIOUS ACTION BY THE SUPREME COURT

This case has previously been passed upon by the Supreme Court of the United States on a jurisdictional question. The Court of Appeals, on a previous appeal, reversed the petitioner's judgment recovered in the trial court and remanded the case to the State court. The Supreme Court, on Writ of Certiorari, reversed the Court of Appeals, sustaining jurisdiction, and remanded the case to the Court of Appeals for a determination of the appeal on the merits. *Grubbs* v. *General Electric Credit Corporation,* U.S. Supreme Court, 31 L. Ed. 2d p. 612.

STATEMENT

Proceedings in the Trial Court:

This suit began as a suit by General Electric Credit Corporation against petitioner T. R. Grubbs to collect a note for $66,000.00 executed by Grubbs to G.E.C.C. Grubbs denied the validity of the note, asserting that it was induced by fraudulent representations and that the consideration therefor had failed. Grubbs also filed a cross-action against G.E.C.C. and the General Electric Company for damages for the tortious destruction of his business by the deliberate and malicious acts of said parties individually and in illegal conspiracy. Trial was to the court without a jury. The trial court, based upon detailed findings of fact, rendered judgment denying G.E.C.C. recovery on the note, because of failure of consideration and fraudulent inducement, and awarding Grubbs $20,000.00 damages against G.E.C.C. for the tortious destruction of Grubbs' business. The General Electric Company was absolved of liability.

Proceedings in the Court of Appeals:

G.E.C.C. appealed on the merits. The Court of Appeals remanded to the State Court on grounds of lack of jurisdiction. The Supreme Court of the United States reversed. Upon consideration of the appeal after reversal and remand to the Court of Appeals, the Court of Appeals again reversed the judgment of the trial court, holding that G.E.C.C. should have recovered on the $66,000.00 note, and that Grubbs could not recover damages for the tortious acts of G.E.C.C.'s "field men" who visited Grubbs' customers and committed the tortious acts, because agency and scope of employment had not been proved. The case was remanded to the trial court for a specification of the

amount of damages caused Grubbs by the direct acts of G.E.C.C. itself, as distinguished from the acts of its "field employees". Petitioner filed his motion for rehearing which was denied on May 14, 1973. Petition to stay the mandate was granted on May 29, 1973.

REASONS FOR GRANTING THE WRIT

1. This case merits review by this court because the holding of the Court of Appeals that G.E.C.C. should recover on the $66,000.00 note, even though it was induced by fraudulent representations, is in direct conflict with the holding of the Supreme Court of the United States in *Schmidt and Story* v. *Bank of Commerce*, 58 L. Ed. 1214, as well as numerous decisions of the Courts of Texas.

2. This case merits review by this court on Certiorari because the decision of the Court of Appeals giving G.E.C.C. a double recovery by allowing it recovery on the $66,000.00 note, as well as the accounts and collateral bought by the note, is such an unjust decision as to be a substantial departure from the accepted and usual course of judicial proceedings as to call for the supervision of this court.

3. This case merits review by this court on Certiorari because the decision of the Court of Appeals to the effect that petitioner cannot recover for the tortious acts of G.E.C.C.'s "field men", even though there was substantial proof of agency and scope of employment, and even though G.E.C.C. confirmed such agency by taking possession of the property seized by such men and selling it, and charging Grubbs with a deficiency thereon, is such a departure from the accepted and usual course of judicial proceedings as to call for the supervision of this court.

ARGUMENT

I.

The question for review No. 1 should, in all logic and fairness, be answered no. The effect of the holding of the Court of Appeals is that a large and powerful nationwide credit corporation can send its employees into the sales territory of a small dealer and into the homes of his customers to pick up merchandise and can destroy that small business man's reputation and his livelihood by malicious falsehoods and other acts, and then can escape liability therefor simply because the small business man's customers could not recall the employees' names, and could not swear that they worked for the credit company, *even though* (1) the men told the customers that they worked for G.E.C.C.; (2) official representatives of G.E.C.C. at the trial did not deny it; (3) G.E.C.C. took immediate possession of the merchandise these *same men* picked up, and G.E.C.C. then sold *that same merchandise,* charging the small business man with a deficiency thereon; (4) it was proved that the men who picked up that merchandise were the men who made the malicious statements; (5) the G.E.C.C. officers admitted that their employees were in that area picking up merchandise from that dealer's customers at the same time the malicious statements were made; and (6) the trial court found that such men were employees of the credit company, acting in the scope of their employment.

In making this holding, the Court of Appeals substituted its judgment on the facts for that of the trial judge who saw the witnesses and heard their testimony, and it held contrary to the well settled laws of Texas and the rules of simple justice and logic.

Evidence that the principal had knowledge of facts, or was in possession of property that it would not be expected to have unless the agency existed, is in itself sufficient proof of agency to support the court or jury finding. This Honorable Court has so held in *Sun Printing and Publishing Company* v. *Moore,* Supreme Court of the United States, 183 U.S. 642, 46 L. Ed. 366. As this court said there,

> ". . . acts done . . . which presuppose the existence of other acts to make them legally operative, are presumptive proofs . . . and slight acts on (the principal's) part, which can be reasonably accounted for only upon the supposition of such acceptance, are admitted as presumptions of the fact." (parentheses supplied)

The Texas Courts have uniformly followed this rule. In *Daugherty* v. *Wiles,* 207 S.W. 900, the Texas Court said:

> "It is well settled that agency may be established by the circumstances, such as the relation of the parties and their conduct with reference to the subject matter. . . ."
>
> "As a general rule, agency cannot be established by proof of the acts of the alleged agent . . . but where such acts are of such character as to justify a reasonable inference that the principal had knowledge of them, and would not have permitted them, if unauthorized, *the acts themselves are competent to show agency.*"

To the same effect are *Alexander Marketing Company* v. *Medford,* 170 S.W. 2d 809. See also *Gleason* v. *Davis,* Supreme Court of Texas, 289 S.W. 2d 228.

This type of situation existed in the case at bar. G.E.C.C. had possession of the merchandise which was

picked up by the men who made the malicious statements. G.E.C.C. sold that very merchandise and charged petitioner Grubbs with a deficiency thereon. Can G.E.C.C. now escape liability because the court says we did not prove that the men who picked up that merchandise worked for G.E.C.C.? G.E.C.C. has not even said that they did not work for them, but the effect of the Court of Appeals' holding is that the court has said it for them. In our case, there was much more than this. We proved agency by circumstantial evidence and by various matters of identity as follows:

A. *Identity of time* . . . it was shown that the approximate time when the statements were made and the time G.E.C.C.'s men Newell and McMichael were in Marion County, Texas picking up merchandise from Grubbs' customers, was *the same.*

B. *Identity of Personnel* . . . appellee proved that the only people who, at this time, picked up any merchandise that Grubbs had sold, were G.E.C.C. agents. Grubbs knew them *and named them* and the depositions of the G.E.C.C. officials admitted that the same men worked for G.E.C.C. at that time and that they were in Marion County at that time picking up Grubbs' merchandise.

G.E.C.C. called as one of its witnesses Mr. James W. Newell, whose testimony covers pages 394 to 410 of the Appendix. He testified in part as follows:

Q. "When did you commence working with the Credit Corporation?

A. "I went to work with them in October 1963, and worked with them through February, 1965.

Q. "And when you left the Credit Corporation in February 1965, were—well, did you go right to work with the people you now work with?

A. "Yes, sir." p. 395.

Q. "Did they include work associated with T. R. Grubbs, or T. R. Grubbs Tire & Appliance Company?

A. "Yes, sir.

Q. "When did you start those duties with relationship to Grubbs Tire & Appliance Company?

A. "I think my first meeting with Mr. Grubbs, as far as working with him, as probably in about December of 1963." p. 396.

Q. "Later on, in the late summer, in August, repossessions were brought to a warehouse that was rented, were they not?

A. "Yes, that is correct.

Q. "Now, Mr. Newell, when you would go to call on one of these retail customers, would you have a record of the status of the customer's account with the Credit Corporation?" p. 398.

A. "Yes, sir, a complete payment record.

Q. "You didn't start going out with a truck though until the late summer or August, is that correct?

A. "That is correct." p. 399.

C. *Identity of merchandise* . . . the very same merchandise picked up by the men who made the statements, showed up in G.E.C.C.'s possession immediately thereafter and was sold by it *as being the same merchandise picked up from Grubbs' accounts.*

D. G.E.C.C. officers testified and participated in the trial and made no attempt to deny that these men were their agents.

The Texas rule on proof of agency is that slight proof is sufficient where full knowledge of the facts is possessed by the defendant and it is difficult of ascertainment by the plaintiff. *General Motors Corporation* v. *Roberson,*

139 S.W. 2d 287; *Hill & Company* v. *Frick*, 135 S.W. 2d 582. As said in *General Motors Corporation* v. *Roberson*, supra:

> "Agency may be proved by circumstances . . . actions speaks louder than words."
>
> "Slight proof made by plaintiff is sufficient to raise the presumption of agency, where full knowledge of the facts is possessed by the defendant and is difficult of ascertainment by the plaintiff . . . When the principal remains silent . . . his silence when the issue of agency is involved, strengthens the probative force of the affirmative truth, and of itself is clothed with certain probative force."

In our case, direct proof of agency was difficult of ascertainments for petitioner because the customers of petitioner were black, uneducated, rural citizens who could not remember the names of the G.E.C.C. agents. They did say they were from G.E.C.C. and were picking up merchandise for G.E.C.C., and they actually picked up the G.E.C.C. merchandise, which was the same merchandise that G.E.C.C. itself later had possession of. G.E.C.C.'s officers sat in the courtroom when this evidence was presented *and never testified to the contrary or attempted to shed any light on the matter.* In fact, as pointed out earlier, G.E.C.C.'s own witnesses admitted that G.E.C.C. agents were in the homes of petitioner's customers during this time, repossessing merchandise. This proof comes clearly within the rule above stated.

It is well settled that failure to produce the agent or failure to present evidence tending to rebut agency when the defendant has such evidence available, is evidence itself of agency, and the silence itself is of probative force. As stated by the court in *Norris Bros.* v. *Mattinson*, 145 S.W. 2d 205:

"When the master does not testify, . . . slight testimony will be accepted to raise the presumption of agency."

"The silence of one in the best position to know the truth will add probative strength to the slight testimony offered by one whose duty it is to establish agency."

To the same effect is *Stripling* v. *Hoing*, 203 S.W. 2d 1016 and 23 Tex. Jur. 2d, Sec. 104, page 145 and cases there cited.

Here petitioner proved all the circumstances as above noted. G.E.C.C. did nothing. It could have said it had no men in the territory repossessing merchandise from Grubbs' customers at that time, but it did not. In fact, it admitted the contrary. G.E.C.C. says it could not prove the men were not its employees because it did not know their names. But petitioner points out that G.E.C.C. could have put on the stand the men who it said were in the field for it at the time and proved that they did not pick up that merchandise (but of course they did), or that some other credit corporation was also in the same area at the same time, picking up merchandise from Grubbs' customers (which of course was not true), but G.E.C.C. made no attempt to do this. Rather, it admitted that its own men were there picking up merchandise from Grubbs' customers and that the corporation *later sold that very merchandise.*

While it is true that agency cannot be established by the declaration of the agent standing alone, such declarations are admissible as corroborative of agency when other circumstances are present tending to show such agency. *Ferguson* v. *Lewis*, 290 S.W. 858; *Germania Fire Insurance Company* v. *Fort Worth Grain & Elevator Company*, 271 S.W. 756. As said in the *Germania* case,

". . . the acts and declarations of the agent are admissible as circumstances tending to show agency."

This is especially true when such statements are part of the res gestae, as they were in our case. See *Ferguson* v. *Lewis,* supra.

The books are filled with cases holding that agency may be, and many times must be, proved by circumstantial evidence and a general course of dealing between the parties, and sustaining the proof on fact situations which are far weaker and with less justice than ours here. See *Mahoney Mining Company* v. *Anglo-Californian Bank,* U. S. Supreme Court, 104 U.S. 192, 26 L. Ed. 707; *Jacksonville M.P.R. & Navigation Company* v. *Hooper,* Supreme Court of the United States, 160 U.S. 514, 40 L. Ed. 515; *Johnson* v. *Hays Furniture Company,* 233 S.W. 2d 934; *Western Union Company* v. *Holt,* 264 S.W. 310; *Jackson* v. *Wales,* 187 S.W. 676; *A.T. & S.F. Railway Company* v. *Andrews,* 338 Ill. App. 552, 88 N.E. 2d 364; 14 ALR 2d 728; 3 Am. Jur. 2d p. 714 and cases there cited.

To hold that petitioner's judgment, so hard earned and well deserved, cannot be sustained because his uneducated witnesses could not remember the names of the credit corporation men who came to their homes and picked up their merchandise, even though there is overwhelming proof of agency by circumstantial evidence, is to make a mockery of the law.

II.

The holding of the Court of Appeals that G.E.C.C. should have been allowed a recovery on the $66,000.00 note is in effect a holding that a credit corporation may force one of its dealers to buy back certain customer accounts it financed for him, taking a promissory note from

the dealer for the amount (purchase price for the transfer) of the accounts, then take back the accounts, pick up the merchandise securing them, collect those accounts itself, and in the ensuing litigation may still recover judgment for the full amount of the promissory note. This is in spite of the fact that the agreement between the dealer and the credit corporation provided that when the dealer was required to purchase accounts, he would then own the accounts he purchased and would have the right to attempt to collect them and if necessary to foreclose and take the collateral securing such accounts.

In making this holding the Court of Appeals is allowing a double recovery to G.E.C.C. and is holding contrary to the settled law of Texas and the nation. It is well settled in Texas and elsewhere that if one purchases property by executing a note for the purchase price, he cannot be held liable on the note if he does not get the property. Stated another way, the transferrer cannot both recover the property and also recover in full on the note. The reason is obvious. It is a double recovery. Yet, that is what will be allowed here if the Court of Appeals decision stands. That such is clearly wrong is evidenced by many Texas cases. *Robinson* v. *Densman*, 470 S.W. 2d 451 and cases there cited; *Perry* v. *Connell*, 31 S.W. 685; *Brown* v. *Viscaya*, 42 S.W. 309; *Adams National Bank* v. *Stone*, 284 S.W. 989.

As held in *Brown* v. *Viscaya*, quoting from headnote No. 2:

> "The consideration of notes failed when they were given to pay for governmental concessions that the payee agreed to transfer . . . and the payee refused to transfer such concessions. . . ."

The court denied recovery to the payee in the note. A similar situation existed in *Perry* v. *Connell*, where the court said:

> "Appellants executed their notes in consideration that the Fuller note should be returned to Perry and appellees . . . failed and refused to return the same, and without explanation and with no offer to return the same, demanded and recovered a judgment . . . There has been a total failure of consideration and judgment should not have been rendered (on the note)." (parentheses supplied)

In *Bryant* v. *Hancock*, 287 S.W. 2d 525, Hancock sold Bryant a truck, taking some cash and a note for the purchase price. Neither the title nor the possession of the truck was delivered to Bryant. Bryant sued to cancel the note; Hancock cross-actioned for recovery on the note and the foreclosure of his mortgage and he secured a judgment for the full amount of the note. The appellate court reversed and rendered judgment canceling the note, saying:

> "If the title . . . never passed from Hancock to Bryant, the consideration for the . . . notes . . . given Hancock by Bryant has failed, and Bryant is entitled to . . . have the notes and mortgage canceled."

Petitioner was in the same position in the trial court here, and the trial judge correctly canceled the note, as was done in the above cited case. In reversing that action and holding that G.E.C.C. may recover both the property and the note, the Court of Appeals committed error such as calls for the supervision of this court. It should be remembered here that petitioner Grubbs got no money or other thing of value for his execution of the note. He got only promises for the execution of the note, and they turned out to be empty and fraudulent.

III.

The Court of Appeals has held below, in effect, that since Petitioner Grubbs "owed G.E.C.C. anyway" for the $66,000.00 worth of accounts placed in the promissory note, G.E.C.C. should be allowed to collect that note in full, in spite of the fact that the evidence showed and the trial court found that the note was induced by fraudulent representations of G.E.C.C. and there was also a failure of consideration. In making this holding the Court of Appeals is in direct conflict with the decision of this Honorable Supreme Court in the case of *Schmidt & Story* v. *Bank of Commerce,* 58 L. Ed. 1214, as well as the settled law of Texas. The same defense claimed by G.E.C.C. here was urged by the defendant in the Schmidt & Story case—that is, that since the payor owed the amount anyway, as a preexisting obligation, a new note given for such debt is enforceable even if induced by fraudulent representations or there has been a failure of consideration. This Honorable Court speaking through Mr. Justice Hughes struck down such argument, saying:

> "It was said that, even assuming the notes in suit to have been given as the result of a willful misrepresentation, the defendants, *being bound by the former notes were held to no greater duty than previously rested upon them,* and hence could not defend upon the ground that they were induced to sign the notes by fraudulent representations.
>
> . . .
>
> "We are unable to agree with this conclusion. The question was not one of a recovery of damages in deceit . . . If there was fraud, it vitiated the transaction, and the plaintiff could not avail itself of its own wrong by enforcing the notes. *The facts that the three de-*

fendants . . . were liable on the former notes, did not place them under any legal obligation whatever to make the notes in suit.

. . .

"The new notes constituted *new promises with distinct legal consequences.* It is clear that the plaintiff could not enforce them if they were fraudulently induced."

In addition, we must point out that petitioner Grubbs here *did not owe* the $66,000.00 as a preexisting obligation, because the accounts representing such amount were nowhere shown to be in default when the note was signed (accounts must have been two payments behind and ten days notice given before petitioner Grubbs was required to buy them back), and the amount of the note represented the settlement of a disputed obligation (Trial Court's finding of fact No. 3). Consequently there is no basis for saying that failure of consideration and the fraudulent representations did not affect G.E.C.C.'s right to collect on the note. But, even if Grubbs did owe the money as an open or agreed account, when the amount was merged into the note, it was a new agreement and if induced by fraudulent representations, as it was, it is unenforceable, as so plainly held by this Honorable Court in the *Schmidt & Story* case.

CONCLUSION AND PRAYER

After nearly ten years in the courts, petitioner's well deserved and hard earned recovery of meager damages for the deliberate and malicious destruction of his livelihood by General Electric Credit Corporation appears about to be taken from him again, on grounds clearly wrong and contrary to settled legal authorities and principles. Petitioner was fortunate enough to have this Honorable Supreme Court of the United States save his case from an arbitrary and clearly erroneous decision of the Fifth Circuit Court of Appeals on a previous occasion. He regrets the necessity to further burden this Honorable Court, but it seems obvious that this Court must again act if petitioner is to have justice and if a clearly erroneous decision is to be corrected.

For the foregoing reasons, it is submitted that the Petition for Certiorari should be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

In The
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29961

GENERAL ELECTRIC CREDIT CORPORATION,
Plaintiff-Appellant,

vs.

T. R. GRUBBS, d/b/a T. R. GRUBBS
TIRE & APPLIANCE,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

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(April 13, 1973)

Before GEWIN, THORNBERRY and CLARK, Circuit Judges.

THORNBERRY, Circuit Judge: General Electric Credit Corporation (GECC), plaintiff below, appeals from a judgment denying it recovery on a note and awarding defendant-appellee Grubbs a $20,000 recovery on his counterclaim. We reverse the judgment below.

Grubbs operated an appliance store in Jefferson, Texas, and sold General Electric products. He financed

his purchases of inventory by means of two distinct arrangements with GECC, a wholly-owned subsidiary of General Electric Corporation. Pursuant to the first of these arrangements, known as trust receipts financing or "floor planning," he paid ten percent of the price of inventory purchased from General Electric, and borrowed the balance from appellant. Merchandise purchased under this arrangement was held by Grubbs in trust, and he was to pay GECC the balance of the purchase price promptly upon sale of the merchandise to a customer.[1] Should Grubbs fail to pay the balance promptly upon sale to the customer, the sale was referred to as a "sale out of trust."

Under the second financing arrangement—the one giving rise to the note upon which appellant brought suit —Grubbs sold to GECC chattel mortgages, notes, and other accounts generated by his sales to customers. The 1955 agreement governing these sales of "chattel paper" obligated GECC to purchase only those accounts that it deemed "acceptable." If a customer defaulted on two or more installments under an account sold to GECC, Grubbs was required, upon demand by GECC, to repurchase that account for cash. If, thirty days after GECC had demanded the repurchase of a defaulted account, Grubbs had not repurchased it, then Grubbs became obligated to repurchase *all* of the accounts he had sold to GECC, whether they were in default or not.

By March 1964, ninety-four of the accounts that Grubbs had sold to GECC, amounting to roughly $67,000, were in default by two or more installments, and Grubbs had not repurchased them as required by the 1955 agree-

1. Under the "floor plan" agreement, GECC had the right to accept the customer's account in lieu of Grubbs' payment of the balance.

ment. Rather than forcing Grubbs to repurchase all of the outstanding accounts sold to GECC (which by this time numbered 671 and amounted to roughly $270,000, exclusive of his ninety-four defaulted accounts), or suing him on his repurchase obligation, GECC proposed that Grubbs execute a note representing the amount due in cash under the repurchase obligation ($67,000) payable in monthly $1500 installments beginning on April 11, 1964.[2] Grubbs and his wife signed the note, telling GECC representatives that they "owed it and had to pay it anyway." Grubbs and his wife testified that appellant induced them to sign the note by assuring them that they would have the sole right to make collections and repossessions under the ninety-four accounts, and by promising to continue purchasing Grubbs' customers' accounts "as before," which Grubbs understood to mean that appellant would purchase substantially all of the chattel paper he tendered. GECC officials, however, testified that Grubbs' obligation to pay the note was not contingent upon GECC's continued purchase of chattel paper. It is clear, nonetheless, that even if appellant did undertake to "continue" purchasing chattel paper from Grubbs "as before," this would obligate appellant to purchase only the accounts it considered "acceptable"; appellant promised to do nothing more than it was required to do under the 1955 agreement, and that agreement was not materially modified by the March 1964 note.

After paying the first $1500 installment on April 11, 1964, Grubbs refused to make further payments; and GECC sued to recover the balance on September 3, 1964. In October 1966 Grubbs amended his answer in several ma-

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2. In 1963, Grubbs had executed another note to GECC, representing his liability to repurchase $69,000 in defaulted paper sold to GECC.

terial respects.[3] First, he asserted that the note was unenforceable because of fraudulent inducement and total failure of consideration. Secondly, he asserted a "cross-action" (actually, a counterclaim against appellant and a third-party action against General Electric Corporation) alleging that appellant and General Electric had violated federal and Texas anti-trust laws and that they had embarked upon a scheme resulting in the total destruction of Grubbs' business.[4] The trial judge, sitting without a jury, heard testimony for two days, and then declared the note unenforceable for fraud and failure of consideration, awarded Grubbs a $20,000 recovery against GECC alone on his claim of "destruction of his business," and denied all other claims for relief (including the alleged antitrust violations).

The Note

On appeal, Grubbs reiterates three theories advanced in the court below in support of his claim that the note was unenforceable because of total failure of consideration. First, he argues that he was required to pay the note only

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3. GECC had brought suit in state court in Marion County, Texas. By his amended pleading, Grubbs made the United States a party to the suit, in order to obtain a determination of priorities among a number of judgment lienholders including the United States (which had obtained judgment under a note assigned to the Small Business Adminstration). The United States removed the suit to the United States District Court for the Eastern District of Texas.

4. As to the acts committed in furtherance of this scheme, Grubbs claimed that GECC had refused to purchase any chattel paper from him after execution of the March 1964 note; that GECC employees had repossessed merchandise covered by some of the ninety-four defaulted accounts charged back to Grubbs pursuant to the note, and in so doing had slandered Grubbs; that GECC had notified Grubbs' customers not to make further payments to him; and that GECC had wrongfully terminated trust receipts financing before Grubbs' franchise had expired. Many of the acts alleged as a basis for recovery under the counterclaim against GECC were also asserted as defenses to the note.

if appellant continued to purchase and pay him for chattel paper tendered to it, and that GECC breached this obligation while the note was still current. As mentioned earlier, it is not at all clear what appellant promised in return for Grubbs' signing the note,[5] but in no event did it undertake more than to *continue* purchasing only "acceptable" paper, as it had done under the 1955 agreement. In any event, after Grubbs had made the first payment on April 11, 1964, he tendered approximately $2600 in accounts to GECC, who at first refused to accept them because they were unacceptable credit risks, but who later accepted accounts worth approximately $1530. Rather than sending Grubbs the cash, however, appellant credited this amount to reserve accounts (established to insure Grubbs' performance of his obligations under the financing arrangements) to cover some $1700 in worthless checks (drawn by Grubbs and by his customers) that Grubbs had tendered as customer payments on accounts sold to GECC and as remittances from Grubbs in payment for trust receipt merchandise.[6] Since the financing arrangements required Grubbs to cover any worthless checks he sent to GECC, there was no practical difference between sending Grubbs the cash and crediting his account to cover the checks. This incident, therefore, was not a failure of consideration. Likewise untenable is the claim that the note was induced by a fraudulent promise to continue purchasing Grubbs'

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5. Under Texas law, Grubbs' pre-existing repurchase obligation was itself sufficient consideration for the 1964 note. Tex. Rev.Civ. Stat.Ann. (Bus. & Comm.) arts. 3.303, 3.408; West Coast Mining Co., Inc. v. Security National Bank, 442 S.W.2d 821, (Tex. Civ.App.—Amarillo 1969, writ ref'd n.r.e.).

6. In response to a hypothetical question, a GECC official testified that GECC violated the March 1964 agreement by crediting $1530 to Grubbs' reserve account instead of sending him the cash. But the hypothetical question made no reference to the worthless checks that Grubbs had sent to GECC; thus, this testimony affords no basis for finding failure of consideration in appellant's crediting the money to the reserve account.

chattel paper. In refusing to accept some accounts, and in crediting the proceeds of others to the reserve accounts, GECC did no more than it had a right to do under the original agreements with Grubbs.

The second alleged instance of failure of consideration was appellant's sending "direct pay" notices to Grubbs' customers, instructing them to make remittances directly to GECC. Appellant was authorized to make collections on accounts that it had purchased; but Grubbs argued that in some cases a notice was sent to a customer, one of whose accounts had been purchased by GECC but whose other account either had not been sold to GECC or had been charged back to Grubbs pursuant to the March 1964 note. These customers, unable to distinguish between accounts owed to GECC and accounts owed to Grubbs, simply stopped paying Grubbs altogether, although Grubbs allegedly was to have the sole right to make collections and repossessions on the ninety-four defaulted accounts represented by the March note. As of August 1964, when the direct pay notices were sent, however, Grubbs was in default on the note, having repudiated it in May or June; and Grubbs will not be heard to justify that repudiation by events occurring months later. It is even possible that sending the direct pay notices to the ninety-four defaulted accounts was not in violation of the March agreement, because GECC officials testified that Grubbs was to have a right to make collections on those accounts only if he continued paying the note.

Thirdly, Grubbs contends that termination of trust receipts financing before his franchise expired was a failure of consideration. But there is absolutely no evidence that continuation of trust receipts financing was promised in consideration for the note. Moreover, when trust receipts financing was terminated in August 1964, Grubbs was

"short" by over $6,000 due to "sales out of trust," and admittedly could not make up the shortage.

In summary, the trial court erred by denying recovery to GECC on the note. Appellant is entitled to recover the balance due under the note, plus reasonable attorneys' fees (Tex.Rev.Civ.Stat.Ann. art. 2226).

The Counterclaim

Here we are concerned only with GECC's alleged liability for the acts it committed pursuant to the scheme to "totally destroy" Grubbs' business. The trial court exonerated General Electric Corporation, and denied Grubbs' claims under the anti-trust laws; and Grubbs does not allege that that part of the judgment was erroneous.

Besides the conduct which we have seen to be authorized by Grubbs' agreements with GECC,[7] the allegedly wrongful acts fall roughly into four categories: (1) failure to credit Grubbs for the price of some inventory removed from his floor when trust receipts financing was terminated;[8] (2) "slanderous accusations" by GECC employees that Grubbs had cheated both his customers and GECC by failing to remit customer payments on accounts purchased by GECC; (3) the mailing of "direct pay" notices to accounts that Grubbs had the exclusive right to collect; (4) appellant's wrongful repossession from customers of merchandise on which it had no lien, and its sale of that merchandise without giving Grubbs the right to bid.

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7. Although Grubbs sought affirmative recovery for appellant's failure to purchase and pay for some customers' accounts and for terminating trust receipts financing in August 1964, the foregoing discussion has shown that none of these acts was improper under Grubbs' agreements with GECC.

8. Appellant concedes that Grubbs is entitled to credit for such merchandise. The trial produced only a rough estimate (approximately $1,000) of the amount of this credit, and on remand the trial court must establish precisely the amount of credit due Grubbs.

"Slanderous Accusations":[9] Several of Grubbs' customers testified that men who "represented themselves to be" or "purported to be" GECC employees[10] visited them in 1964 and 1965, and said that Grubbs had swindled them and cheated GECC by failing to remit to GECC customer payments collected by Grubbs and owed to GECC under accounts GECC had purchased. In order to hold GECC liable for these statements, Grubbs of course had the burden of proving that the men were in fact GECC employees and that the statements were made in the course of their employment; but we have combed the record in vain for competent proof of either of these elements. The customers' recollections of what the men represented themselves to be was hearsay,[11] and Texas courts hold that such testimony, even if admitted without objection, is no proof at all of agency or scope of employment. *Lewis* v. *J. P. Word Transfer Co.*, 119 S.W.2d 106 (Tex.Civ.App.—Dallas 1938, writ ref'd). Even if the "men" themselves had testified, their testimony standing alone would not have supported a finding of agency. *Robertson Tank Lines, Inc.* v.

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9. Appellant contends that these statements, made between July 1964 and January 1965, give rise to a cause of action in slander; since recovery was not sought for them until October 1966, when Grubbs amended his pleading, Grubbs' recovery for these statements is, says appellant, barred by the Texas one-year statute of limitations applicable to slander. On the other hand, Grubbs argues that the statements were merely part of a scheme designed to ruin his business, and that the one-year statute is inapplicable under Brown v. American Freehold Land Mortgage Co., 97 Tex. 599, 80 S.W. 985 (1904). Owing to the approach we take to this part of Grubbs' counterclaim, we intimate no view as to this controversy.

10. None of these men testified at trial.

11. The representations of agency cannot even be brought within the amorphous confines of Texas' "res gestae" exception to the hearsay rule. Grubbs made no attempt to show that the purported agents were "in the instant grip of violent emotion, excitement or pain," 1 McCormick & Ray, Texas Law of Evidence 684 (2d ed. 1956), while "representing" themselves to be GECC agents.

VanCleave, 468 S.W.2d 354 (Tex. 1971). Grubbs was not entitled to any recovery for the allegedly "slanderous accusations" made to his customers.

"Direct Pay" Notices: From our review of the record, we cannot say that the trial court clearly erred in determining that GECC was liable to Grubbs for the injury caused by sending "direct pay" notices to customers some of whose accounts were owed solely to Grubbs. We are, however, unable to determine how many of Grubbs' (as distinct from GECC's) accounts were sent the notices, or to determine the amount of customer payments that Grubbs lost when his customers stopped paying in reliance on the notices. We accordingly remand to the court below for determination of the amount of damages due Grubbs for GECC's mailing the direct pay notices.

Wrongful Repossession and Sale: Again, appellant does not seriously dispute Grubbs' claim of damages for GECC's repossession from customers of merchandise on which GECC had no lien. Some of the repossessed merchandise had been purchased from Grubbs on open account, and Grubbs had not financed his purchase of the merchandise with GECC. Other repossessed merchandise was covered by the ninety-four defaulted accounts represented by the March 1964 note, and we cannot say that the trial court clearly erred in finding that Grubbs had the sole right to make collections and repossessions on these accounts. GECC disposed of this repossessed merchandise in two sales. During the first, Grubbs and his wife's brother-in-law were permitted to bid on the merchandise after opening the bids of other prospective purchasers. Grubbs was not, however, permitted to bid at the second sale. But again we are compelled to remand to the court below for a precise determination of the amount of damages caused by the wrongful repossessions and sale.

Needless to say, we cannot accept the trial court's award of $20,000 as a blanket recovery for "destruction of Grubbs' business." The evidence tended to show that Grubbs had been operating at a loss prior to the events giving rise to the instant suit, and that it was only a matter of time until his business failed. On remand, Grubbs' recovery is to be limited to (1) credit for "trust receipt" merchandise which was not credited to him when trust receipts financing was terminated, (2) Grubbs' losses on accounts which he had the sole right to collect, caused by the mailing of the "direct pay" notices, and (3) credit for merchandise wrongfully repossessed from Grubbs' customers and sold.

In summary, we reverse as to the trial court's failure to award GECC a judgment on the note; we reverse the award of $20,000 in damages on Grubbs' counterclaim, and remand for a precise determination of damages on his counterclaim.

Costs shall be taxed to appellee.

REVERSED AND REMANDED.

APPENDIX B

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 29961

GENERAL ELECTRIC CREDIT CORPORATION,
Plaintiff-Appellant,

vs.

T. R. GRUBBS, d/b/a T. R. GRUBBS
TIRE & APPLIANCE,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

ON PETITION FOR REHEARING

(May 14, 1973)

Before GEWIN, THORNBERRY and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX C

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk
600 Camp St. - Rm. 102
New Orleans, La. 70130

Edward W. Wadsworth
Clerk

May 30, 1973

Mr. J. R. Cornelius
Attorney at Law
123 N. Polk
Jefferson, Texas 75657

No. 29961—General Electric Credit Corp. vs. T. R. Grubbs, d/b/a T. R. Grubbs Tire & Appliance

MANDATE STAYED TO: AND INCLUDING JUNE 29, 1973

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

Enclosed is a copy of the opinion, judgment and order denying rehearing which are still required by the Supreme Court to be incorporated as an appendix to your petition.

Very truly yours,

Edward W. Wadsworth, Clerk
By /s/ Clare F. Sachs
Deputy Clerk

enc.
cc to:

Mr. Hubert D. Johnson
Mr. B. A. Britt, Jr.
Mr. Roby Hadden